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IN THE

Supreme Court of the United States

October Term, 1954.

No. 155

MARY H. LATTA,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States:

The petitioner prays the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment and decision of that Court rendered on March 24, 1954, which judgment and decision affirmed the decision of the Tax Court of the United States promulgated on May 25, 1953.

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts are not in dispute. In 1929 the petitioner (Mrs. Latta, formerly Mrs. Bissell) separated from her husband, Leonard R. Bissell, leaving with him their two adopted minor children (R. 18a). Thereafter Mrs. Latta wanted one of the children to live with her, but Bissell would not consent to this. Mrs. Latta then suggested creating a trust for the children, and it was agreed that if she did she could have one of them (R. 19a).

In pursuance of this agreement Mrs. Latta, on March 11, 1930, transferred property to three trustees under an indenture of trust, reserving the income to herself for life; thereafter the two adopted children, or their issue, were to enjoy the income and principal (R. 18a-19a). Following this, one of the children went to live with her (R. 19a-20a). Mrs. Latta named Mr. Bissell, her estranged husband, as a co-trustee, knowing he would not be compliant with her wishes (R. 18a, 4a, 7a-8a). The two other trustees were lawyers (R. 38). Mrs. Latta named these particular trustees to prevent herself from changing her mind and undoing the trust under the provision reciting: "This entire trust agreement may be rescinded or may be modified in any way at any time by the unanimous consent of all the Trustees and the Donor" (R. 4a, 19a).

In 1932 Mrs. Latta was divorced from Bissell and remarried (R. 20a). Bissell also remarried in 1932, undertaking the additional support of two of his new wife's children (R. 8a, 21a).

From 1932 to December 1947 Mrs. Latta repeatedly endeavored to obtain the trustees' consent to revocation of the trust, but with no success (R. 3a, 20a). Bissell had impelling reasons for resisting revocation, namely, to preserve the gift for his children and to prevent any action whereby it would be taken from them and returned to Mrs. Latta (R. 8a-9a). Also, the trust placed him in a better position to protect his salary as an officer of a company, a large block of the stock of which was held in the trust (R. 6a, 9a-10a). Without the consent of the children or their issue at least one of the other trustees would never have returned the trust property to Mrs. Latta (R. 6a).

In December 1947 the three trustees and Mrs. Latta amended the trust, eliminating the provision permitting recission or modification (R. 20a, 37).

The Court below held that Section 86.3 of Treasury Regulations 108 was controlling and required the conclusion that Mrs. Latta completed the gift of the trust re-

mainder in 1947 and not, as she contended, upon creation of the trust in 1930 (R. 31-36). This regulation provides that a gift is incomplete if the donor has retained the power to alter or revoke it in conjunction with any person *not* having a "substantial adverse interest in the disposition of the transferred property or the income therefrom" (R. 32). The Court also concluded that the trustees had no such interest because they were not beneficiaries of the trust.

Judge Hastie dissented in the Court below (R. 36-40). In his view, the regulation, which established a conclusive, irrebuttable presumption that the gift was not completed until 1947, in disregard of the fact Mrs. Latta had actually surrendered dominion and control of the property in 1930 and thus completed the gift then, was invalid and without statutory authority.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code effective September 1, 1948 (28 U. S. C.). The judgment of the Court of Appeals was entered on March 24, 1954 (R. 40).

QUESTIONS PRESENTED.

(1) Did the petitioner make a taxable gift in 1947? This depends upon the answers to the following questions:

(2) Is Section 86.3 of Treasury Regulations 108 valid or invalid?

(3) If the regulation is valid, is a *direct* legal or equitable interest in the trust property or the income therefrom a prerequisite of "a substantial adverse interest"?

REASONS FOR ALLOWING THE WRIT.

(1) The Decision of the Court Below Is Believed to Be in Conflict With the Applicable Decisions of this Court on a Matter of Special Importance in the Gift Tax Law.

In *Burnet v. Guggenheim,* 288 U. S. 280 (1933), *Estate of Sanford v. Commissioner,* 308 U. S. 39 (1939), and *Smith v. Shaughnessy,* 318 U. S. 176 (1943), this Court has laid down the guiding principle that the test of whether a taxable gift is made is whether, *in substance and in reality,* the donor has surrendered dominion and control over the gift property.

The decision of the Court below cannot be reconciled with this principle. It is fundamentally, if not diametrically, opposed to it. The decision below was bottomed squarely on the regulation, for the Court said the first question is "whether the regulation is to be given effect according to its own language" (R. 32). It answered affirmatively and accorded to the language of the regulation absolute statutory weight. In its view, the regulation established a conclusive irrebuttable presumption that the petitioner did not surrender dominion and control until December 1947 because of her right, up until that time, to participate in the group decision with the three trustees to modification or recission of the trust. It held that under the regulation this right in and of itself necessarily vested dominion and control in the petitioner, notwithstanding that she may *in fact* have previously surrendered dominion and control. Writing for the majority, Judge Goodrich, after defining the term "adverse", said (R. 35-36):

> "Now Mr. and Mrs. Bissell may have been adverse in one of these senses *as a matter of fact.* At the time of the creation of the trust they had separated and there was a divorce two years later." (Emphasis added.)

Judge Hastie was convinced that the majority of the Court believed that the petitioner had surrendered dominion and control upon creation of the trust in 1930, for, after reviewing the facts, he said (R. 39):

> "On these facts *I believe we all recognize that in practical effect as well as technically the taxpayer surrendered control and dominion over the remainder interest in the trust estate in 1930.* Thus, if the language of the gift tax statute is given normal interpretation we are forced to conclude that there was no gift in 1947." (Emphasis added.)

In his view, *the fact* that the petitioner had in reality surrendered dominion and control in 1930 *was decisive.* He, accordingly, sharply disagreed with the majority which considered the irrebuttable language of the regulation, and not *this fact,* to be controlling.

(2) The Decision Below Does Violence to the Plain Language of the Controlling Statute (Internal Revenue Code, Sec. 1000(a)) Imposing a Tax "upon the transfer * * * of property by gift."

In *Robinette v. Helvering,* 318 U. S. 184 (1943) this Court in referring to the gift tax statute said (p. 187):

> "The statute 'is aimed at transfers of the title that have the quality of a gift.'"

A transfer has such quality when the property is put beyond *the donor's* control and dominion, determined as a question of fact and not as a matter of conclusive presumption in disdainful disregard of the facts. In determining this question, it is immaterial that the donee's interest is neither fixed, nor ascertainable (*Herzog v. Com-*

missioner, 116 F. 2d 591 (C. C. A. 2d, 1941)), nor indefeasibly vested.* As stated in *Hernstadt v. Hoey,* 47 F. Supp. 874 (D. C. N. Y. 1942) at p. 876:

> "* * * it is the parting with the dominion and control by the donor, rather than the receipt of property by a donee which determines gift tax liability."

The Court below predicated its decision on a technical, artificial and inflexible rule of thumb that a gift cannot *under any circumstances* be complete if the donor has a power to alter or revoke it in conjunction with persons "not having a substantial adverse interest in the disposition of the transferred property or the income therefrom."

This egregious error of the two-judge majority in the Court below (and that of the single judge who rendered the decision in the Tax Court) arose from reading into the controlling statutory term, "transfer of property * * * by gift", the precise adverse interest concept of Section 86.3 of Regulations 108. In 1947, however, this regulation had no statutory warrant whatever. True, Section 501(c) of the 1932 Revenue Act had adopted the adverse interest concept, but it was rejected by repeal of Section 501(c) in 1934.

It was the decision of this Court in 1933 in *Burnet v. Guggenheim* that prompted Congress to take this action. In that case a gift was held incomplete where the donor *alone* had power to revoke it. Thereby, the provisions of Section 501(c) *to like effect* were made unnecessary and redundant.

The *Guggenheim* case, however, certainly did *not* deal with conjunctive powers and also make unnecessary and redundant the *other* provisions of Section 501(c) that a gift is incomplete if the power to revoke is in the donor and another person not having a substantial adverse interest. The Court below, however, based on the 1934 Com-

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* See *Commissioner v. Procter,* 142 F. 2d 824 (C. C. A. 4th, 1944), certiorari denied, 323 U. S. 756 (1944); *Goodwin v. McGowan,* 47 F. Supp. 798 (D. C. N. Y. 1942).

mittee Reports, erroneously concluded that Congress repealed the section, believing such provisions were in the law under the *Guggenheim* decision. It upheld a regulation which purports to continue in the law a concept abandoned by Congress. Such a decision grossly misconstrues Section 1000(a).

Would Congress repeal the very precise and technical provisions of Section 501(c) relating to conjunctive powers and intend them definitely to remain in the law on the basis of a decision of this Court which did *not* involve conjunctive powers and which speaks in terms of "substance" and "reality"? It would not.

Even assuming this was the Congressional purpose, could this "passive" intention or belief continue those provisions in the law when unsupported by affirmative enactment of legislation in 1934? It is submitted, that it could not.

In pertinent part the Committee Reports provide (H. R. Rep. No. 704, 73rd Cong., 2d Sess. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess. 50):

> "This section [511] repeals Section 501(c) of the Revenue Act of 1932, since the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court decision in the Guggenheim case (53 S. Ct. 369)."

What did Congress have in mind in referring to "the principle" of Section 501(c)? Was not "the principle" of that section, as distinguished from its detailed provisions, that actual dominion and control of the property by the donor determines when a gift has been made? Apart from logic, the language of the repealing section itself (Section 511 of the Revenue Act of 1934 (48 Stat. 680, 758)) supports this view.

Judge Hastie reviewed this legislative history and concluded that Congress by repealing Section 501(c) intended to abandon the ***1932 statutory rule of thumb*** and to leave the courts free to apply a ***flexible rule of reason*** in deter-

mining when a gift was made in conjunctive power cases. Thus, he found that Congress left a statutory vacuum in conjunctive power cases. The contrary decision of the majority below does great violence to the simple statutory language "transfer of property * * * by gift" and raises a question of grave importance in the construction of this Federal statute and in the gift tax law.

(3) The Decision Below Presents Two Vital Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

(a) Just recently the United States Court of Appeals for the First Circuit in *Camp v. Commissioner,* 195 F. 2d 999 (1952) said (p. 1001):

> "This segment of tax law, as to when a transfer in trust is to be deemed a completed gift for purposes of gift tax, has been in a somewhat cloudy state * * *."

The question has troubled taxpayers and the Commissioner alike. Treasury Regulations 108, Section 86.3 has served to muddy the problem by reason of its conflict with the principles established by this Court and by reason of its inconsistency with itself, for other provisions of the very same regulation recognize that whether a gift is complete or not is a question of fact.

The majority of the Court below adopted the Commissioner's view that in the type of case presented here, as distinguished from all others, the answer is not dependent on the reality of dominion and control. Rather, inquiry into the facts as to this is altogether barred under and because of the Commissioner's regulation. Under the decision below the petitioner would have been deemed to have surrendered dominion and control in 1930 *if, and only if,* one of the trustees had been a beneficiary of the trust. Nothing else would have represented a loss and surrender by her of dominion and control. This decision is unprecedented.

The problem presented is not an isolated, singular and unusual one, and the decision below will have wide and far-

reaching application in the administration of the gift tax law. It involves a basic fundamental of when a gift is made. It is of dire importance, and an authoritative decision of this Court on the validity of Section 86.3 of Regulations 108 is clearly called for.

(b) If the regulation is valid, an important question also raised by the decision below is what constitutes a "substantial adverse interest in the disposition of the transferred property or the income therefrom." Under that decision every single gift will be incomplete and nontaxable in conjunctive power cases unless a person holding the power with the donor has a *direct* legal or equitable interest in the property, or the income therefrom. This would be so notwithstanding that the donor had truly lost dominion and control of the property and had no actual command over it, the situation here. If the regulation is valid, the answer to this question will be of far-reaching consequence in the gift tax law and a matter of crucial importance.

PRAYER.

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Third Circuit; that the judgment and decision of the Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 155

MARY H. LATTA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 18-23) are unreported. The majority and dissenting opinions of the Court of Appeals (R. 31-40) are reported at 212 F. 2d 164.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1954. (R. 40) The petition for a writ of certiorari was filed on June 21, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether taxpayer's relinquishment in 1947 of her power to revoke or modify, with the consent of all of the trustees, a trust which had been created by her in 1930, subjected her to gift tax liability in 1947 under Section 1000 of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 1000 of the Internal Revenue Code and Treasury Regulations 108 are set forth in the Appendix, *infra*, pp. 11-20.

STATEMENT

The facts, as found by the Tax Court (R. 18-20), may be summarized as follows:

On March 11, 1930, taxpayer, who was separated from her husband, executed a trust instrument which transferred to Maxwell S. Wheeler, Welles V. Moot, and Leonard R. Bissell (her estranged husband),[1] as trustees, 405.031 shares of stock of the Hubbell Realty Corporation, 2,314.668 shares of stock of the General Drop Forge Company, Inc., and 308.045 shares of stock of the Federal Telephone and Telegraph Company (R. 18).

The trust instrument provided that the trustees should pay the net income received from the trust to the taxpayer during her life, and, upon her death, should pay such income in equal shares to Cynthia and Rufus, the adopted children of tax-

[1] Taxpayer was divorced from Leonard R. Bissell in May, 1932, and was married to Thomas H. Latta in June, 1932 (R. 20).

payer and her estranged husband. The trust contained further provisions directing the payment of the principal of the trust to the adopted children progressively as they reached certain ages and other remainder provisions in case of the death of either child. (R. 18-19.)

The trust instrument gave taxpayer the power, in the event of the death, resignation, or disqualification of any of the trustees, to appoint a successor (R. 19).

The trust provided that it might be rescinded entirely or modified in any way at any time with the unanimous consent of the three trustees and the grantor (R. 19).

The trustees were forbidden by the trust instrument, during the life of the grantor, to lease, sell, transfer, invest, reinvest, mortgage, or encumber the trust funds without the written consent of the grantor (R. 19).

On December 14, 1947, taxpayer and the three trustees, modified the original trust instrument by eliminating the provision permitting the revocation or modification of the trust by the grantor with the unanimous consent of the trustees, and the provision requiring her consent to the lease, sale, transfer, investment, reinvestment, mortgage, or encumbrance of the trust property.[2] As so modified, the trust instrument declared the trust to be irrevocable and provided that it might not be re-

[2] Taxpayer and the trustees had previously on July 28, 1944 and November 15, 1947, modified the trust instrument by changing the interests of the remaindermen (R. 19).

scinded or modified in any manner at any time by any person or persons. (R. 19.)

Taxpayer filed a gift tax return for the year 1947, but did not include therein the property which was the subject of the trust, and the Commissioner determined a deficiency against taxpayer on the ground that taxpayer's relinquishment on December 14, 1947 of her right to rescind or modify the trust resulted in a completed and taxable gift of the remainder interests after her life estate.[3]

The Tax Court sustained the deficiency, subject to an exemption adjustment not material here (R. 23).[4] The Court of Appeals affirmed, one judge dissenting (R. 31-40).

ARGUMENT

Taxpayer's case turns upon the question whether the trust executed by her in 1930, in which she reserved the power, with the consent of the trustees, to revoke the trust, became a completed gift at the time of its execution in 1930, or in 1947 when she relinquished the power to revoke. If the trust transfer became a completed gift in 1930, there would have been no gift tax due, since the law did not impose a tax on gifts at that time. If, however, the transfer became a completed gift in 1947 when the

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[3] See Transcript filed in this Court, Document 2.

[4] In holding that the trust transfer did not become a completed gift in 1930, as contended by taxpayer, the Tax Court rejected taxpayer's theory that one of the trustees (her estranged husband) had a substantial adverse interest in the disposition of the trust property sufficient to render wholly ineffective her retained power to revoke the trust with the consent of the trustees.

power to revoke was relinquished, it became taxable at that time, and the gift tax deficiency determined by the Commissioner under Section 1000 (a) of the Internal Revenue Code, *infra,* p. 11, was proper.

Both courts below held that the trust transfer involved in this case did not become a completed gift in 1930 because taxpayer had reserved the power to revoke the trust and because the trustees upon whose consent the revoking power depended had no substantial adverse interest in the disposition of the trust property. This holding is correct, and the question does not warrant further review.

Taxpayer recognizes (Pet. p. 4) the holding of this Court in *Burnet* v. *Guggenheim,* 288 U. S. 280, to the effect that a gift may not be considered as being complete where it is coupled with power in the donor to revoke it, and that it becomes complete only when the power to revoke is relinquished. She argues, however, that since the *Guggenheim* case involved a power reserved to the donor alone, it is not controlling here where the power to revoke was conditioned upon the consent of the trustees. She then contends, in effect (Pet. pp. 6-8), that there is nothing in Section 1000(a) of the Internal Revenue Code to preclude a donor from effecting, by a deed of trust, a completed gift at the time the trust is executed, even where he reserves the power to revoke the trust, so long as the donor's reserved power to revoke may be exercised only with the consent of the trustees, who need not have a substantial adverse interest

in the disposition of the trust property. On the above hypothesis, taxpayer asserts (Pet. p. 6) that Treasury Regulations 108, Section 86.3, *infra,* pp. 14-20, relied upon by the court below, which provides that a donor shall be considered as himself having the power to revoke where it is exercisable by him in conjunction with a person not having a substantial adverse interest in the disposition of the trust property, is contrary to Section 1000(a) of the Internal Revenue Code. Taxpayer's contentions are without merit.

This Court has long held that an *inter vivos* gift of property is not completed at the time of execution where the donor reserves to himself the power to revoke the trust or to change the beneficiaries, and that it does not become a gift consummate until the power of control is relinquished. *Burnet* v. *Guggenheim,* 288 U. S. 280; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39; *Rasquin* v. *Humphreys,* 308 U. S. 54. The gift tax statute "is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." *Burnet* v. *Guggenheim, supra,* at page 286. See also *Robinette* v. *Helvering,* 318 U. S. 184, 187.

In the *Guggenheim, Sanford* and *Rasquin* cases, the donor reserved the revoking or modifying power in himself alone. But the principles announced in those cases apply equally where the exercise of the reserved power is conditioned upon the consent of other persons who have no substantial adverse interest in the disposition of the prop-

erty. Grantors usually select persons friendly to them as trustees. Hence, such persons, unless they have a substantial adverse interest in the property, may be expected to follow the will of the grantor. At least, it would be unreasonable to presume that they will not do so. And without such a presumption there would be no way of determining, at the time of the execution of the trust, whether the gift had been placed beyond recall by the grantor, for it would be utterly impossible to ascertain, at that time, the future state of mind of the trustees. Hence, under taxpayer's theory, a gift would be considered as being completed and a tax imposed thereon, despite the fact that there would be no manner of proving until the donor's death that the gift had been placed beyond recall, unless in the interim the donor and the trustees should revoke it, which would, of course, prove that it was not a completed gift. In the circumstances, it is clear that the rule embodied in Treasury Regulations 108, Section 86.3, *infra*, pp. 14-20, that a gift is incomplete where it is coupled with a power in the grantor and other persons to revoke, unless the other persons have a substantial adverse interest in the disposition of the property involved,[5] merely carries out the pur-

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[5] The opposite presumption, which is implied in the regulation, that a person having a substantial adverse interest in the disposition of the trust property will follow the dictates of his own interests rather than those of the donor, seems to be a reasonable one.

pose of Section 1000(a) of the Internal Revenue Code to impose a gift tax only on gifts that have been placed beyond recall. See *Commissioner* v. *Prouty,* 115 F. 2d 331, 333 (C. A. 1) and *Camp* v. *Commissioner,* 195 F. 2d 999, 1003 (C. A. 1).

Taxpayer contends (Pet. pp. 6-8) that the Treasury Regulation above mentioned embodies a concept of law that has been abandoned by Congress, and in that connection points to the fact that the same concept was contained in Section 501(c) of the Revenue Act of 1932, 47 Stat. 169, 245, which was repealed by the Revenue Act of 1934, 48 Stat. 680, 758. Taxpayer's argument attributes no force whatever to the reasons expressly given by the Congressional Committees for repealing Section 501(c) of the Revenue Act of 1932. Both the House and the Senate Committees in reporting the repealing bill to the Congress said (H. Rep. 704, 73rd Cong., 2d sess., p. 40; S. Rep. 558, 73rd Cong., 2d sess., p. 50):

> This section repeals section 501(c) of the Revenue Act of 1932, since the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court's decision in the *Guggenheim case* (53 S. Ct. 369).

Since the principles expressed in the repealed Section 501(c) were identical with those now embodied in Treasury Regulation 108, Section 86.3, it is beyond question that the regulation is authorized by and is in harmony with Section 1000(a).

Taxpayer's endeavor (Pet. pp. 6-8) to show that the Congressional Committees were acting under a misapprehension because this Court did not deal with conjunctive powers to revoke in the *Guggenheim* case is unsound. In the *Guggenheim* case, this Court, at page 283, after quoting Section 501 (c) which embodied the rule now included in the present regulation, said:

> We think the regulation, and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924.

Since the Revenue Act of 1924 (43 Stat. 253, 313), did not expressly embody any of the language of Section 501(c), it is plain that this Court considered that the entire substance of Section 501(c) is implicit in any gift tax statute not expressly including it. In any event, it is clear that Congress intended that the gift tax statute would, after the repeal of Section 501(c), implicitly include all of the principles embodied in the repealed section.

The question whether the trustees in the instant case had a substantial adverse interest in the disposition of the trust property is, of course, a question of fact. Both courts below concurred in the finding that they had no such interest. The settled rule of this Court makes concurrent findings of two courts below final here in the absence of exceptional error. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214. The findings here are fully supported by the evidence.

CONCLUSION

The decision is correct, there is no conflict of decisions, and further review is not called for. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1954.

APPENDIX

Internal Revenue Code:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * *

(e) [as added by Section 502(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by the Joint Resolution of June 25, 1947, c. 143, 61 Stat. 178] *Certain Discretionary Trusts.*—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title

to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1940, and on or before December 31, 1947 (or on a later date in any case where it is shown to the satisfaction of the Commissioner, in accordance with regulations prescribed by him with the approval of the Secretary, that failure to relinquish prior to such later date was for reasonable cause), of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this chapter. If such property was transferred in trust, the grantor not retaining such power to revest title thereto in himself, or if such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deduc-

tions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this chapter to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this chapter. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property.

(26 U.S.C. 1952 ed., Sec. 1000.)

Treasury Regulations 108, promulgated under the Internal Revenue Code:

SEC. 86.1 [as amended by T. D. 5833, 1951-1 Cum. Bull. 83]. *Imposition of Tax.*—The statute imposes no tax upon property, but subjects to tax transfers of property by gift. The statute taxes all such transfers of property (to the extent that they exceed the deductions authorized by section 1004) other than the following: gifts specified in section 1003(b) (2) and (3); releases before July 1, 1951, of powers to appoint created on on before October 21, 1942, the date of enactment of the Revenue Act of 1942; certain relinquishments of powers over discretionary trusts described in section 1000(e) and over reciprocal trusts

described in section 1000(g); and, as described in section 86.2(d), the assignment or relinquishment in 1949 or 1950 of certain reserved rights over income from property transferred before March 4, 1931, and, in certain cases, before June 7, 1932. The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See section 86.8.) The tax applies to all individuals, whether resident or nonresident of the United States, but, in the case of a nonresident not a citizen, the tax applies only to transfers of property situated within the United States. * * *

SEC. 86.2. *Transfers Reached.*—(a) *In general.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * *

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SEC. 86.3 [as amended by T. D. 5606, 1948-1 Cum. Bull. 129, and by T. D. 5833, *supra*]. *Cessation of Donor's Dominion and Control.* —(a) *In general.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability

to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefiit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one

of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

A donor shall be considered as himself having the power where it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by

the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. For example, if A transfers property in trust for the benefit of B and C but reserves the power as trustee to change the proportionate interests of B and C, and if A thereafter has another person appointed trustee in place of himself, such later relinquishment of the power by A to the new trustee completes the gift of the transferred property, whether or not the new trustee has a substantial adverse interest. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt.

If the donor contends that the power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

(b) *Relinquishment of powers over certain*

discretionary trusts.—Section 1000(e), as added by section 502 of the Revenue Act of 1943 and amended by Public Law 112, Eightieth Congress, provides in the case of property transferred in trust before January 1, 1939, under which the grantor, on and after such date, retained no power to revest title to such property in himself, exercisable by the grantor alone or in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, that the relinquishment by the grantor on or after January 1, 1940, and prior to January 1, 1948 (or on a later date if it is shown to the satisfaction of the Commissioner, whose determination therein shall be conclusive, that failure to relinquish prior to such later date was for reasonable cause), by an exercise or other termination, of a power to change the disposition of the trust property, which completes the gift thereof, shall not be treated as a gift for the purposes of the gift tax statute. However, if the property had been transferred in trust without the grantor retaining power to revest title to the property in himself, or if such power previously retained had been relinquished, while a Federal gift tax statute was in effect, the exemption provided by section 1000(e) shall apply only if (1) gift tax had been paid with respect to such prior transfer or relinquishment, and not credited or refunded, or a gift tax return had

been filed within the time prescribed on account of such prior transfer or relinquishment but no gift tax paid because of deductions or exclusions claimed on such return, and (2) the grantor agrees in writing to continue to treat such prior transfer or relinquishment as completing the gift for all purposes of the gift tax statute except as hereinafter indicated with respect to income. Upon submission of such written agreement, the Commissioner may make any necessary redetermination of the amount of the net gifts for such prior year, and, unless assessment is barred by statutory limitations or rule of law, assert any resulting deficiency tax. The exemption provided by section 1000(e) shall not apply to any payment or other disposition of income while the grantor retains the power of disposition of the future income from the trust property. For example, if a donor created a trust in 1930, reserving a power to change the beneficiaries and their proportionate interests with respect to principal and income, but without retaining the power to revest the property in himself, and terminates his reserved power in 1947, so that he is no longer able to change the beneficiaries or their respective interests, the interim payment of income to any beneficiary or other surrender by the donor of control over such income prior to such termination is nevertheless a taxable gift and to be treated accordingly. The same result follows if a similar

trust was created while a gift tax law was in effect and the donor, prior to January 1, 1948, terminated the aforesaid reserved power, consenting to treat the original transfer in trust in the calendar year in which effected and for all periods thereafter as having been a transfer subject to gift tax. * * *

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